(30,956)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 315

MARION & RYE VALLEY RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 30, 1925

[fol. 1] **IN UNITED STATES COURT OF CLAIMS**

C-699

MARION & RYE VALLEY RAILWAY COMPANY, PETITIONER

I. PETITION—Filed June 1, 1923

To the Honorable Judges of the United States Court of Claims:

The petitioner respectfully represents:

1. That it is a corporation organized under the laws of the State of Virginia, with its principal office in the City of Marion, in the State of Virginia, and that its post office address is at Marion, Virginia.

2. That it has at all times borne true allegiance to the Government of the United States.

3. That at all times hereinafter mentioned it was engaged in business as a common carrier of freight and passengers for hire, operating a line of railroad from Marion in the State of Virginia to Sugar Grove in said State, and that during the period January 1, 1918 to June 30, 1918, the same being the first six months of the period of the Federal control of Railroads, it connected with the rails of the Norfolk & Western Railway Company, then under Federal control.

4. That it was taken under Federal control of the Government of the United States, and the President thereof, by virtue of a [fol. 2] Proclamation of the President of the United States, of date, December 26, 1917, which said Proclamation was made as provided by Section 1 of the Act approved August 29, 1916, entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes;" and of the Act of Congress approved March 21, 1918, commonly called the "Federal Control Act," and that it was not relinquished from such control until the 29th day of June, 1918; and that it had no contract for compensation with the Director General of the United States.

5. That it has submitted to the Director General of Railroads an application for compensation, for a sum not in excess of the standard rate of return (one half of the average railway operating income of the three years ended June 30, 1917, as defined in Section 1 of the said Federal Control Act) but that the Director General has declined and still refuses to make the petitioner any payments of any amounts whatsoever or any agreement for payment of compensation to it.

6. That its average annual railway operating income, as defined in Section 1 of the Federal Control Act, was Twenty-one thousand, nine hundred ninety-one and 91/100 ($21,991.91) dollars, and that one-half thereof applicable to the period between January 1, 1918 and June 29, 1918, the same being the period in which the Petitioner was under Federal Control as aforesaid, was Ten thousand, nine hundred ninety-five and 95/100 ($10,995.95) dollars and that it received as net income for the said six months period One [fol. 3] thousand eight hundred ninety-seven and 43/100 ($1,897.43) dollars, leaving due it as balance of compensation, the sum of Nine thousand, ninety-eight and 52/100 ($9,098.52) dollars.

7. That during the period between January 1, 1918 and June 29, 1918, the same being the period in which the Petitioner was under Federal Control as aforesaid, it suffered depreciation of equipment by reason of the failure of the Director General and the President of the United States adequately and appropriately to provide for the maintenance, repairs, renewals and depreciation of rolling stock and equipment in the sum of Seven thousand, forty-one and 29/100 ($7,041.29) dollars.

8. That during the period between January 1, 1918 and June 29, 1918, the same being the period in which the Petitioner was under Federal Control as *as* aforesaid, it suffered damage by reason of the failure of the Director General and the President of the United States to adequately and appropriately provide for the Maintenance of Way and Structures in the sum of Three thousand, nine hundred twelve and 55/100 ($3,912.55) dollars.

9. That by reason of the premises this Petitioner claims and contends that it is entitled to have, and receive from the United States through the Director General of Railroads the sum of Twenty thousand, fifty-two and 36/100 ($20,052.36) dollars, with interest at the rate of 6 per cent per annum from the date of relinquishment of the carrier's property, but which the Director General refuses to [fol. 4] pay or allow to the Petitioner and refuses to pay or allow any sum whatsoever to the Petitioner.

10. That because of the refusal of the Director General to pay or allow any sum whatsoever to the Petitioner, or to make any agreement for payment of compensation to it, the Petitioner has, as provided by Section 3, of the said Federal Control Act, made application for the appointment of a Board of Referees to hear and report upon the amount of the just compensation and such board has been appointed by the Interstate Commerce Commission, as in the aforesaid section of said Act provided, and said board has given full hearing to the Petitioner and the United States, and has reported to the President the amount of the just compensation in accordance with the provisions of the said Act.

11. The report of said Board finds as follows:

(a) That Federal Control of plaintiff's (petitioner) railroad property within the intent of the Federal Control Act was established in law and in fact at 12:00 noon on December 26, 1917, and continued until June 29, 1918, that for the purpose of determining just compensation such Control period is considered to be the first six months of 1918 under stipulation of counsel.

(b) That compensation for the use of plaintiff's railroad property should be calculated upon the basis of an implied lease by the Government and agreement to pay the fair rental therefor.

(c) An unadjusted balance of just compensation due the plaintiff [fol. 5] of Nine thousand seven hundred twenty-eight and 57/100 ($9,728.57) dollars.

(d) That it (the Board) has jurisdiction and clearly it is its duty to consider and report upon plaintiff's claims on account of the alleged undermaintenance of its properties.

(e) That Four thousand six hundred ninety-seven and 37/100 ($4,697.37) dollars is just compensation to the plaintiff on account of the failure of respondent to return its property in as good repair and complete equipment as it was in, at the commencement of Federal Control; and that the total amount of unadjusted compensation due the plaintiff from the respondent (The Director General of Railroads) is Fourteen thousand four hundred twenty-five and 94/100 ($14,425.94) dollars.

Copy of the report of the Board is attached as appendix to this Petition.

12. That the Director General of Railroads still refuses to pay or allow any sum whatsoever or to make an agreement for just compensation to the Petitioner.

13. That no assignment or transfer of said claim or of any part thereof or interest therein has been made.

14. That the claimant is justly entitled to the amount herein claimed from the United States after allowing all just credit and offsets.

Wherefore the Petitioner prays the Court of Claims of the United [fol. 6] States to determine the amount of such just compensation, as provided by said Section 3 of the Federal Control Act.

(Signed) Marion & Rye Valley Railway Railway Company. J. P. Buchanan, Attorney for Floyd L. Knight, Trustee. F. Sitterding, President Marion & Rye Valley Railway Company. Ben B. Cain, Attorney of Record.

International Building, 1319 F Street N. W., Washington, D. C.

Sworn to by Geo. F. Cook et al. Jurats omitted in printing.

[fol. 7] Know all men by these presents:

That I do hereby authorize Ben B. Cain of Washington, D. C., to appear for me as counsel before the Court of Claims, in the matter of Compensation Docket No. 77, formerly before the Interstate Commerce Commission, and now pending in said Court of Claims, on petition of the Marion & Rye Valley Railway Company.

Witness my bond at Lynchburg, Virginia, on the 8th day of May, 1923.

(Signed) Floyd L. Knight, Trustee.

STATE OF VIRGINIA,
City of Lynchburg, To wit:

I, M. P. Davis, a Notary Public in and for the City and State aforesaid, do certify that Floyd L. Knight, Trustee, whose name is signed to the foregoing writing dated the 8th day of May, 1923, has this day [fol. 8] personally appeared before me in my City aforesaid, and acknowledged the same.

Given under my hand and seal the 8th day of May, 1923.

(Signed) M. P. Davis, Notary Public. (Seal.)

STATE OF VIRGINIA,
City of Richmond,
Virginia, To wit:

Know all men by these presents:

That I, F. Sitterding, President of the Marion & Rye Valley Railway Company, do hereby make, constitute, appoint and authorize Ben B. Cain, of Washington, D. C., attorney for the Marion & Rye Valley Railway Co., to appear for said Company before the Court of Claims in the prosecution of matters arising out of the decision of the Board of Referees of the Interstate Commerce Commission in the matter of Compensation Docket No. 77, and to do all things necessary in the premises.

Given under my hand this the 10th day of May, 1923.

(Signed) F. Sitterding, President, Marion & Rye Valley Railway Co.

VIRGINIA,
City of Richmond, To wit:

I, N. L. Flippen, a Notary Public in and for the City and State aforesaid, do certify that F. Sitterding, President of the Marion & Rye Valley Railway Company, whose name is signed to the foregoing writing dated the 10th of May, 1923, has this day personally appeared [fol. 9] before me in my county aforesaid, and acknowledged the same.

My commission expires November 27th, 1923. Given under my hand and official seal, this the 29th day of May, 1923.

(Signed) N. L. Flippen, Notary Public.

Compensation Docket, No. 77

MARION & RYE VALLEY RAILWAY COMPANY, Plaintiff

v.

DIRECTOR GENERAL OF RAILROADS, Respondent

REPORT OF REFEREES

Submitted June 2, 1922. Report Made Sept, 30, 1922

S. S. Ashbaugh, George H. Parker, J. P. Buchanan and Ben B. Cain for Plaintiff.

A. A. McLaughlin and Sidney F. Andrews for Respondent.

To the President of the United States:

The undersigned, a board of referees appointed by the Interstate Commerce Commission on February 6, 1922, in performance of duties prescribed in section 3 of the federal control act (40 Stat. 451), [fol. 10] makes this, its report, upon the claim for just compensation presented by the Marion & Rye Valley Railway Company, a corporation of the State of Virginia, herein called plaintiff.

Plaintiff contends, in substance, that it operated a railroad by steam power and was a common carrier engaged in the transportation of passengers and property for hire; that on December 28, 1917, its railroad property was taken under Federal control by virtue of a proclamation of the President of the United States; that its railroad property was not relinquished from Federal control until June 29, 1918; that it submitted to the Director General of Railroads its application for compensation for the use of its property during the period of said control; and that the Director General of Railroads has declined, and still refuses, to make any payment, or agreement for payment, of compensation to plaintiff for said use.

Its claim for compensation for the use of its property as revised at the hearing, is based upon the standard return (hereinafter described) as follows:

One-half standard return applicable to period during which plaintiff claims to have been under federal control, Jan. 1, 1918, to June 29, 1918	$11,626.00	
Minus net income for said period	1,897.43	
		$9,728.57
Depreciation due to lack of adequate maintenance of its property		10,493.33
Total		$20,221.90

[fol. 11] The respondent did not file a written answer, but at the hearing admitted that plaintiff at the time in question operated a railroad as a common carrier for hire and that the Director General

of Railroads had refused to make any payment on account of the alleged federal control of plaintiff's said railroad. Respondent denied all other allegations of the complaint.

Following are the principal issues in this proceeding, raised by the pleadings and by the contentions of counsel:

Was there such control of plaintiff's railroad by the Government during the first six months of 1918 as to entitle it to the benefits of the Federal Control Act?

If plaintiff is entitled to compensation should it be fixed on an annual rental basis or measured by pecuniary loss suffered by reason of Federal control?

What is the amount of just compensation, if any, to which plaintiff is entitled?

Has the board jurisdiction to hear and determine plaintiff's claims on account of deferred maintenance?

[fol. 12] What is the amount, if any, to which plaintiff is entitled on account of underinaintenance of its property?

Was there such control of plaintiff's railroad by the Government during the first six months of 1918 as to entitle it to the benefits of the Federal Control Act?

Respondent contends (1) that in order to entitle it to compensation plaintiff must show an actual (as distinguished from a technical) possession, use, control and operation of its railroad by the Government and has failed to make such showing; (2) that plaintiff operated its own railroad during the said period, within the meaning of section 204 of the Transportation Act, 1920, which in such case provides an exclusive remedy with the Interstate Commerce Commission, and the board is accordingly without jurisdiction in these proceedings, which were not instituted until after the passage of said Act.

On December 28, 1917, plaintiff was engaged in the business of general transportation as a common carrier of passengers and property for hire and operated a steam railroad within the boundaries of the continental United States and wholly within the state of Virginia, approximately 22 miles long, including side-tracks, extending from Marion to Sugar Grove, Virginia, where it connects with the Virginia Southern Railroad which is under the same management and ownership as the Marion & Rye Valley Railway. Plaintiff's railroad connected with the Norfolk & Western Railway at Marion, Virginia, and in addition a large portion of the traffic which came to it over [fol. 13] the lines of the Virginia Southern Railroad Company was competitive since it came from a country which was equally accessible to the Virginia Southern Railroad and the Virginia Carolina Railroad. The latter was under federal control, being a part of the Norfolk & Western Railroad system. Plaintiff's railroad was not owned, controlled or operated by another carrier company.

(1) On August 29, 1916, Congress passed the National Defense Act, so-called (C. 418, 39 Stat. 619) providing that:

"The President in time of war is empowered * * * to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

On December 26, 1917, the President, referring to the then existing state of war, proclaimed that pursuant to the power vested in him by Congress he did thereby take possession and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation in the United States.

It is argued that the possession intended under said Act was to be evidenced by the utilization of the railroad for war purposes and the exclusion as far as necessary of other traffic over it. The record is not clear as to what specific use the commodities carried by plain- [fol. 14] tiff's railroad were put to. There is testimony to the effect that certain manufactured products, notably tanning extract, used in tanning leather, was stimulated by the war. Timber continued to be carried but whether any of it ever found its way into the numerous war camps is not shown. If respondent means that in order to constitute actual possession and control there must have been transportation of troops or of actual materials to equip them in their camps or in the field over plaintiff's railroad this board cannot concur. Private interests were under contract with the government constructing camps, building ships, manufacturing apparel, and producing foods. All of these industries and many others were closely connected with the emergency and had to be afforded transportation.

Directly following the President's proclamation, Wm. G. McAdoo, named therein as Director General of Railroads, sent out many general orders and circulars to the railroads generally, some of which were shown to have been received by the plaintiff and are contained in the record as exhibits, among which are the following:

General Order No. 1, dated December 29, 1917, directing among other things, that all railroad officers, agents and employees may continue in the performance of their present regular duties; that all railroads covered by the President's proclamation be operated as a national system without regard to ownership; that the designation of routes by shippers be disregarded in the interest of efficiency; that agreements between carriers be not permitted to interfere with expedition of traffic.

A circular letter dated January 8, 1918, addressed to all railroad [fol. 15] officers and employees, urging their utmost energy and devotion in their work and announcing that they were, in effect, in the service of the United States.

General Order No. 28, dated May 25, 1918, establishing a twenty-five per cent rate increase covering all railroads under federal control,

effective June 10, 1918, as to passenger rates and baggage charges and effective June 25, 1918, as to freight rates, compliance wherewith appears to have been finally effected after the date of the notice of relinquishment (see infra) but prior to its receipt by the plaintiff.

A notice that plaintiff's railroad had been relinquished from federal control, dated June 24, 1918, but not received until after July 1, 1918. Some question arising as to the effective date of the relinquishment, it was stipulated by counsel for the parties that the claim might be considered to cover the first six months of 1918.

General Order No. 1 and a circular letter of January 8, 1918, received by the plaintiff following the President's proclamation above noted, constituted the officers and employees of the plaintiff the officers and employees of the government. Regional directors and federal managers were later appointed for the railroads generally but no additional steps were necessary to make the officers and employees of the carriers the officers and employees of the government. As employees of the government their operation of plaintiff's railroad was the operation of the government through its constituted agents.

Effective March 21, 1918, Congress passed the Federal Control Act (C. 25, 40 Stat. 451). Its title, "To provide for the operation of transportation systems while under federal control, for the just compensation of their owners, and for other purposes," defines the [fol. 16] purposes and general motive of the Act. The seventh paragraph of section 1 of said Act reads:

"That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control" as herein defined and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: Provided, however, that nothing in this paragraph shall be construed as including any street or interurban electric railway * * *."

Plaintiff's railroad falls within the class referred to in said seventh paragraph. No distinctions are made as between actual and technical control. All railroad of the class described "shall be held and considered as within 'Federal control' as herein defined * * * and shall be entitled to the benefit of all the provisions of this Act." The language used is clear and unambiguous. It is followed by the proviso, "That nothing in this paragraph shall be construed as including any street or interurban electric railway * * *." It is to be concluded from the fact that street railways are expressly excluded in this Act that if it had been intended to exclude from the benefits of the Act the "short lines," or any such as were not more or less directly used in war work, it would have been done in like unmistakable manner. Furthermore the board considers that paragraph 7 of section 1 confirms a federal control [fol. 17] already established by the President's proclamation and

does not regard it as an original taking of control. Any other view would be inconsistent with other sections of the Act, in particular, section 14 which provides methods for relinquishing such railroads as after a period of federal control were found not needed, and bears out the conclusion that all railroads were included in the first taking.

(2) Effective February 28, 1920, Congress passed the Transportation Act, 1920 (C. 91, 41 Stat. 456), which, so far as it is relevant to the matter at hand, was an act specifying the terms upon which the Government relinquished its control of the railroads. Section 204 of this Act applies exclusively to carriers

"by railroad which during any part of the period of Federal control; engaged as a common carrier in general transportation, and competed for traffic; or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation."

Said section 204 provides that any such carrier shall be paid a sum calculated to offset its deficit in income (the existence and amount of such deficit being determined by comparison with its income during the test period) "for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation," only.

Respondent contends that this Board is deprived of jurisdiction of the proceeding by the above provision of the Transportation Act in that it confers exclusive jurisdiction upon the Interstate Commerce [fol. 18] Commission to reimburse carriers of the class specified for any such deficit in income incurred for that portion (as a whole) of the period of federal control during which they operated their own railroads. Respondent's brief, pp. 15-16, reads:

"It is very evident that, by passage of this Act, Congress intended to distinguish between roads that had technically been taken over by the terms of the President's proclamation and those actually taken and actually operated by him."

In the opinion of the board, Congress did not have in mind the distinction between actual and technical operation and control but rather the fact that many roads of the class to which plaintiff's road belongs had been relinquished in accordance with section 14 of the Federal Control Act and that in those instances both a period of private and of governmental operation existed during the period of Federal control as a whole.

Respondent distinguishes the decision in Application of St. Joseph Belt Ry. Co., 65 I. C. C., 443, wherein under very similar circumstances the Interstate Commerce Commission, Division 4, denied the carrier compensation under section 204 of the Transportation Act because it was considered that it was not being privately operated, alleging that there was evidence in that case of certain acts of the Director General which supplied the necessary elements

to constitute federal control and operation, but which are lacking in the case at hand. That this was not the controlling consideration is shown by the following extract from the decision in that case (pp. 5-6):

[fol. 19] "Although not detailed in this record, it is a well-known fact that the extent to which the Director General found it necessary to change existing organizations and practices varied greatly with the different railroads taken over. In some cases, the changes were undoubtedly slight; in others, they were substantial. Under these circumstances, an attempt to draw a line of distinction between roads taken over by the Government, classifying some as Federally operated and others as privately operated, would meet great difficulties. A more practical view is to regard the taking over of the roads by the President, the appointment of the Director General, and the assumption of authority by him and his representatives, as supplying the necessary elements to constitute Federal operation as well as Federal control. In the case of the St. Joseph Belt, as we have seen, the Director General exercised control in the most important matters affecting the income of the carrier. In at least one important instance, the action taken was not only without the consent of the owners, but was against their desire."

If respondent's contention that actual (as opposed to technical) control and operation must be established as a prerequisite to a carrier's right to compensation under the Federal Control Act were to be carried to its logical conclusion the date when acts of federal direction became of sufficient importance to constitute actual control and operation would have to be determined with regard to every carrier in the country and the compensation of each adjusted accordingly.

We find and report that federal control of plaintiff's railroad property within the intent of the Federal Control Act was established in law and in fact at 12 o'clock noon on December 28, 1917, and con-[fol. 20] tinued until June 29, 1918; that for the purpose of determining just compensation such control period is considered to be the first six months of 1918 under stipulation of counsel.

If plaintiff is entitled to compensation, should it be fixed on an annual rental basis or measured by pecuniary loss suffered by reason of Federal control?

At the close of the hearing respondent made the following motion to dismiss, upon which decision was reserved:

"I now desire to renew my motion made at the close of the plaintiff's case, that this case be dismissed on its merits, because of the absence of proof of any loss suffered by this railway company during the first six months of 1918, caused by any act of the Government or the Railroad Administration."

The contention is that the government should not be called upon to make good the difference between what the railroad earned during federal control and a fair rental for its use based on its normal earn-

ings, for the reason that the conditions which lowered the railroad's income, such as loss of traffic and high operating costs, resulted from general war conditions and were not due to federal control or any act of the government.

The government is never deemed liable in tort for its own acts or the acts of its agents. Its liability, if any, therefore, must be of [fol. 21] a contractual nature. In Johnson v. United States, 2 Ct. Cls. 391, involving an action to recover for the military occupation of land which the court found was a temporary occupation only, it was said:

"But the court has also held to the principle of the common law that the republic does no wrong and the provision of the Constitution 'nor shall private property be taken for public use without just compensation' and by virtue of these, it always had been held that a party might recover upon the implied contract as though the property had been acquired under an agreement of purchase, leaving the price undetermined."

To the same effect: United States v. Great Falls Mfg. Co., 112 U. S. 645.

Accordingly the liability resulting from the taking and use of this railroad was by implication contractual, involving under the constitution the payment of just compensation therefor. Congress could not by legislation modify the nature of this fundamental obligation and in fact has not attempted to do so. The Federal Control Act, preceded by proclamation of the President by which the railroads were taken, recognizes that the government's liability was of this nature.

The first paragraph of Section 1 of the Federal Control Act reads:

"That the President, having in time of war taken over the possession, use, control and operation (called herein Federal control) of certain railroads * * * is hereby authorized to agree with and to guarantee to any such carrier * * * that * * * it shall [fol. 22] receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal Control not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen."

Whenever found possible to negotiate an agreement with a carrier, under the above paragraph, that agreement must fix the compensation to be paid for use of the railroad property upon an annual guaranteed basis, which terminology calls for a fixed sum in the nature of a rental and not an indeterminate amount to be based upon losses when and if they result from federal control. It does not appear in this record, but it is a matter of common knowledge that in pursuance of section 1 of the Federal Control Act, the contracts made by the Director General of Railroads with the carriers provided for compensation upon a fixed rental basis.

The agreement as to compensation called for in said section 1, it should be noted, is a voluntary one and the compensation thereunder is to be based generally upon the average annual operating income for the three years ended June 30, 1917, as a maximum. This three year period will hereinafter be referred to as the test period and said average annual income for said test period as the standard return.

Where no agreement has been reached between the carrier and the Director General, as is the situation in the case under consideration, the claim is to be submitted to a Board of Referees pursuant to Section 3 of said Act, which is the section under which this board functions. The portion of said section with which we are here concerned reads:

[fol. 23] "Said boards shall give full hearings to such carriers and to the United States; shall consider all the facts and circumstances, and shall report as soon as practicable in each case to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one."

To hold that an entirely different theory and method of compensation should be adopted for cases where the government has not reached an agreement with the carrier, from that authorized and used where an agreement with the carrier has been reached, would involve a strained construction of the statute. Unquestionably, as contended by respondent, the determination of just compensation under said section 3 is a judicial proceeding not in any way controlled by the maximum compensation fixed by Congress for the agreement provided for in section 1. However, without consideration of the Federal Control Act, it appears that compensation for the temporary taking and use of property in a military emergency would in a judicial proceeding be determined upon the theory of an implied lease and agreement to pay a fixed rental. In re Condemnation of Lands for Military Camp, 250 Fed. 315; Clifford v. United States, 34 Ct. Cls. 223; Pope v. United States, 26 Ct. Cls. 11; Johnson v. United States, 2 Ct. Cls. 391.

The Board finds that compensation for the use of plaintiff's railroad property should be calculated upon the basis of an implied lease by the government and agreement to pay the fair rental therefor. Respondent's motion to dismiss is denied.

[fol. 24] What is the amount of just compensation, if any, to which plaintiff is entitled?

In our judgment there is insufficient evidence in the record upon which to arrive at a fair valuation of plaintiff's railroad properties and we will not therefore attempt to consider the percentage return upon the fair valuation in making our finding of just compensation for the use during the said six months' period. There is no evidence as to the amount for which the railroad could have been rented; and there is no likelihood that there was any market for its rental. In our opinion evidence of earning power offers the best measure for

our finding of the fair rental value of plaintiff's property in the claim under consideration. It appears, furthermore, that the rental value must be taken as of the commencement of federal control. United States v. Gill, 87 U. S. 517; Pope v. United States, 26 Ct. Cls. 11; Johnson v. United States, 2 Ct. Cls. 391.

Since we are limited to the determination of the value of the lease as of December 28, 1917, it follows that only the then known conditions and in addition such as might be foreseen by reasonably intelligent business men can be given any weight in our conclusions. This is based on justice and sound reasoning, because the lessor of a [fol. 25] business would have no standing in court to urge a reduction in rental if the results of his own management showed a declining income, and because he must also assume its risks—the lessee being no longer in a position to dictate its policies and its success depending chiefly upon the efforts and sagacity of the lessor alone. Accordingly our judgment of the rental value of the lease in this case must be based largely on the evidence before us of plaintiff's earning power prior to December 28, 1917. It is quite true, as respondent's attorney points out, that this Board is in no way bound by the standard return as a measure of just compensation. Nevertheless, it is worthy of our most earnest consideration that past earning power as evidenced by an average for a period of years was adopted as a basis of value in the Federal Control Act after long investigation and was the agreed measure in the standard contract entered into by the Railroad Administration and most of the carriers after many months of conference. However, such evidence of past earning power must be considered, together with any evidence of conditions existing December 28, 1917, which might then have been reasonably expected to affect the future revenues and expenses of a railroad.

Plaintiff's average annual net railway operating income for the three years of the test period, so-called, as certified by the Interstate Commerce Commission was $23,252, one-half of which is $11,626.00. The actual net railway operating income earned by the property for the first six months of 1918 was $1,897.43.

The following table shows plaintiff's net railway operating income for each of the years ended June 30, 1917, and the annual and semi-annual averages of the total thereof:

[fol. 26] June 30, 1912	$24,757.24
June 30, 1913	24,385.85
June 30, 1914	20,108.73
June 30, 1915	20,531.20
June 30, 1916	21,369.52
June 30, 1917	29,510.50
Total	140,663.04
Average 1 year	23,443.84
Average 6 months	11,721.92

It will be seen that there is very little variance between the income for an average six months of the six-year period ended June 30, 1917,

and that of an average six months of the test period or one-half the standard return.

Respondent submitted a statement showing the operating income and revenue tonnage of the plaintiff's railroad both prior and subsequent to federal control. In so far as said statement applies to the period prior to federal control it is properly given consideration, but not to show traffic conditions after January, 1918, or for the purpose of comparison with the first six months of 1918 which latter could not have been known at the time when federal control was instituted, our view being that we must place ourselves in the position of the parties at the time the implied lease was effected. All past and present operations and conditions on December 28, 1917, including matters from which deductions as to future income might be drawn, could under this rule be available for our consideration but not the actual figures of operations subsequent to that date. The county was at war, but what the effect of the war upon the income of the carrier [fol. 27] would be was highly problematical. Increased operating expenses were doubtless foreseen, but it might have been expected that freight rates would keep pace with them and a heavy movement of the chief commodities carried by plaintiff for military purposes, resulting in a large net income, might even have been anticipated; provided there had been no evidence at the time of a depletion of natural resources and curtailment of industries as a result thereof. Said exhibit considered for a period not later than January 1, 1918, shows a declining tonnage in the transportation of "products of forests" but on the other hand a very considerable increase in the carriage of "manufacturers." Under the headings "products of mines" and "other freight" the tonnage appears to have remained comparatively steady and the changes in totals of all classes of freight are not large enough to be significant. Knowledge of the fact that two mills had been closed was available to the parties but the evidence does not disclose whether the depletion of timber made it unlikely mills would start up at other points along the line of plaintiff's railroad under stimulus of war demand; and as an offset manufactured products were showing a substantial increase.

In view of the fact that the duration of Federal control could not be foretold on December 28, 1917, and the lease, therefore, was for an indeterminate period it is our opinion that the fair rental should be based upon an average of expected earnings for a period of years and not upon the immediate outlook for business for the first six months of 1918. Since plaintiff's operating income for the six years ended June 30, 1917, showed a six months' average of $11,721.92, its claim for compensation based upon the six [fol. 28] months' average for the three years ended June 30, 1917, amounting to $11,626.00 (one-half the standard return) is within the six months' average return that might have been expected of the property on December 28, 1917.

We find and report that Eleven thousand six hundred twenty-six dollars ($11,626.00) was and is just compensation, not including sums which may be found due on account of under-maintenance, to the plaintiff for the aforesaid use of its property

during the said period of Federal control. Actual net income for the first six months of 1918 earned by the property was $1,897.43 leaving an unadjusted balance of just compensation due the plaintiff of Nine thousand seven hundred twenty-eight and 57/100 ($9,728.57) dollars.

Has the board jurisdiction to hear and determine plaintiff's claims on account of deferred maintenance?

That the plaintiff was entitled, in addition to a reasonable rental for the use, to have its property "returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control" was recognized in the President's proclamation of December 26, 1917, and confirmed in the Federal Control Act, and we do not understand that the right in itself is challenged.

Section 3 of the Federal Control Act, which is the source of this Board's powers, reads:

"That all claims for just compensation not adjusted (as provided in section one) shall * * * be submitted to boards, [fol. 29] each consisting of three referees * * *. Said boards shall give full hearing to such carriers and to the United States; shall consider all the facts and circumstances, and shall report as soon as practicable in each case to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one. The President is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board, and may include therein provisions similar to those authorized under section one. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated."

Paragraph 1 of said section 1, to which reference is made, authorizes the President to agree with any carrier that "it shall receive as just compensation an annual sum" for the use of its property during the period it is under Federal control, said sum not to exceed the standard return hereinbefore described. Paragraph 4 of said section 1 prescribes that the agreement shall contain adequate provisions for maintenance so that the carrier's property may be returned to it in as good condition as it was in at the beginning of Federal control and for reimbursements to the United States for additions and betterments not justly chargeable to the United States.

Respondent contends that the just compensation which the board is authorized to report is limited by said section 3 to the just compensation contemplated in paragraph 1 of section 1 above men- [fol. 30] tioned and that no jurisdiction is conferred upon the board to report the just compensation due the carrier in the event

of failure to maintain its property as contemplated by paragraph 4 of section 1.

The 5th amendment to the Constitution provides "nor shall private property be taken for public use without just compensation." As seen above a temporary taking of private property for public use is regarded as a lease by the government from the owner. Fundamental to a lease of this character is the right of the lessee to receive compensation for the use of his property and in addition to have it adequately maintained. In re Condemnation of Lands for Military Camp, 250 Fed. 314. This right, as we have said, does not appear to be challenged, but, on the contrary, is squarely recognized in said paragraph 4, section 1. It follows that a judicial determination of just compensation in its usual sense and as recognized by the Act must include compensation for a failure to maintain the property in case such failure is established. Section 3 of the Act, above quoted, provides for a judicial determination of just compensation by this board and unless the context clearly shows a contrary intention the term just compensation must be construed to be therein used in its full and usual sense.

The passage upon which respondent relies is that wherein the board is directed to report to the President "the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one." Paragraph 1 of said section 1 does relate exclusively to the just compensation for the use (annual [fol. 31] rental). But paragraph 4 of said section 1 relates to other rights. Moreover, that the annual compensation referred to in paragraph 1 is not the same as the just compensation referred to in section 3 is evidenced by the fact that Congress obviously recognized that the standard return which is legislated as maximum compensation for the voluntary agreement as to compensation in said paragraph 1 could not be fixed as a maximum for the judicial determination of compensation provided for in section 3.

To secure a full perspective, the question of jurisdiction to hear and determine plaintiff's claim on account of under-maintenance of its property should be viewed with reference to the surrounding facts. The Federal Control Act was passed effective March 21, 1918, and the early decisions rendered by previous boards appointed under section 3 were handed down while Federal control of the railroads was still in effect. During such control it was obviously impossible to compute the sum which would measure the amount by which the Government failed to return a particular property at the end of the control period in as good repair as when taken over. Accordingly the reports of many previous boards, of necessity, were limited to a finding of annual compensation for the use. Inasmuch, however, as such a finding was incomplete without a determination of the rule of maintenance, the findings of compensation in those cases were made subject to the carrying out of the provisions relating to upkeep of property contained in the standard contract between the Director General of Railroads and the carriers. There was no denial of jurisdiction by such

previous boards, as has been contended; on the contrary the fact that they did fix a rule of maintenance was an affirmation of jurisdiction of the subject matter. Following the termination of Federal control it has become possible to make an estimate, based upon established rules of railroad maintenance, as to the compensa-
[fol. 32] tion due the carrier in the event the Government had failed adequately to maintain its property.

Effective February 28, 1920, Congress passed the Transportation Act, which provided (Sec. 200 (a)) that Federal control of the Railroads should terminate at 12.01 a. m. March 1, 1920, and (Sec. 202) that as soon thereafter as practicable the President should "adjust, settle, liquidate and wind up all matters, including compensation, and all questions and disputes of whatsoever nature arising out of or incident to Federal control." Section 203, after providing for payments to carriers with which no contract fixing or waiving compensation had been made of the whole or so much of the estimated compensation as would meet fixed or corporate charges, reads:

"(b) The acceptance of any benefits by a carrier under this section:

(1) shall not deprive it of the right to claim additional compensation which, unless agreed upon, shall be ascertained in the manner provided in section 3 of the Federal Control Act;"

It must be assumed that in passing this Act Congress was fully alive to the conditions that would exist upon termination of Federal control; that it was cognizant of the fact that executory provisions for upkeep of property would be out of place in any agreement then made between the President and carrier and in the event that the carrier's property had not been adequately maintained it would have a just claim for compensation on account thereof. Accordingly the word compensation must be assumed to have been used in its full sense and it must be concluded that Congress intended the provi-
[fol. 33] sions of Section 3 of of the Federal Control Act to be construed from the standpoint of conditions existing at the end of Federal control.

In view of the fact that Federal control is terminated and any agreement now made would therefore no longer contain executory provisions for upkeep of the property and in view of the fact that the Transportation Act, as above quoted affirmatively determines any question as to the continuance of this board's powers following Federal control, the provisions of section 3 must be regarded and construed from the standpoint of their application to an executed agreement between the President and plaintiff. Referring, with this consideration in mind, to the opening passage of section 3 which precedes the passage upon which respondent bases his contention, it will be noted that "all claims for just compensation not adjusted (as provided in section one)" are to be submitted to boards of referees for consideration and report. Paragraph 4 of section 1, as has been seen, prescribes that the agreement authorized in section 1 shall

contain adequate provision for maintenance of the property. Therefore in case of inability of the parties to agree upon the proper provisions for maintenance under said paragraph or in the absence of any agreement, as is the situation in the case before us, a claim for "just compensation not adjusted (as provided in section one)" would exist in the event that property had not been adequately maintained.

It is true that an agreement with the carrier including the board's finding of compensation for failure to maintain is not the same as an agreement containing provisions for adequate maintenance; but section 3 does not contemplate that the agreement entered into following the board's report of just compensation shall be the same [fol. 34] as the agreement provided for in section 1; it merely provides that the President "may include therein provisions similar to those authorized under section one."

Consideration must also be given to the fact that section 3 makes the proceedings before the board a condition precedent to the right of the parties to invoke the jurisdiction of the Court of Claims and the amount of just compensation awarded and the facts found are made prima facie correct in said Court. Unquestionably Congress intended all items of plaintiff's claim for compensation to be considered by the board in order that a decision of the whole claim would be available for review by the Court of Claims in case either party desired such review.

In view of the above it is the opinion of the board that it has jurisdiction and clearly is its duty to consider and report upon plaintiff's claims on account of the alleged undermaintenance of its properties.

What is the amount, if any, to which plaintiff is entitled on account of under-maintenance of its property?

Plaintiff introduced direct testimony to the effect that its roadbed and equipment was not in as good condition at the end of Federal control as it was on January 1, 1918, which testimony was not contradicted by the respondent. Moreover, the fact that it is shown by the railway records that less was expended on maintenance of its property during the first six months of 1918 than expended during a semiannual average of the test period is corroborative of this evidence as to the relative physical condition of plaintiff's property on January 1, 1918, and on June 30, 1918. We accordingly find and report that plaintiff's property was not returned to it by the Govern- [fol. 35] ment following Federal control in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control.

No direct testimony was introduced to show the amount by which the roadbed and equipment failed to be in as good repair following Federal control but we apprehend that the introduction of such evidence can not be demanded in all cases, taking into consideration the fact that Federal control was instituted upon short notice in mid-winter and that a full comprehension of all that such control entailed was had by few, if any, at the commencement thereof. It is considered by the board that in the claim under consideration, the best measure of the amount of depreciation of the carrier's prop-

erty due to undermaintenance during the six months of Federal control is a measure based upon the difference between the expenditures for maintenance made during said control period and the expenditures for maintenance normally made by the carrier during a like period. The following table is primarly based upon the expenditures made by the carrier for maintenance during an average six months of the test period and the actual expenditures for maintenance during the control period, as shown by plaintiff's Exhibits 16 and 17, from which have been deducted such items as are considered to have been properly urged by the respondent (respondent's Exhibits 2 and 5) to be improperly charged to maintenance for the periods in question. Instead of applying a common equation factor to the total expenditures for the test period for the purpose of arriving at the difference in costs between the two periods, wherever comparable items have been found in both periods, the actual 1918 price has in the case of each item been applied to the quantity shown [fol. 36] to have been used during an average six months of the test period. This method has the merit of showing the exact appreciation in costs for the items in question, so far as the data before us permits, and since the total of comparable items in dollars and cents is considerably in excess of the total amount of the non-comparable items, although fewer in number, its application should more nearly work justice between the parties than the use of a common equation factor for all items. Upon the assumption that all items in an average six months of the test period would have normally occurred in the control period, the total of all such items, against which no similar items are shown in the control period, has been taken and to it has been applied a common equation factor. The factor used is based upon the difference in price for the test period and the actual 1918 price of all items shown for the average six months of the test period against which there are comparable items shown in the control period, and was arrived at by dividing the total expenditures for such items during said six months' test period into the total sum which would have been paid for the same quantities of such items at the 1918 price. For the reason that comparable items of materials are few the totals of all such items appearing both under "Ways and Structure" and "Equipment" have been used in determining a factor to be used for both. For the same reasons, and because of the fact that same items appearing in plaintiff's exhibits under the head of "materials" also include the labor involved in their application, we have considered it advisable to include the item "labor" in the totals upon which our figures are based.

	Six months' test period				Six months 1918, actual				Test period quantity at 1918 price
Foreman	6 mos.	$753.75=	1 mo.	$125.62 —	6 mos.	$1,050.00=	1 mo.	$175.00	$1,050.00
Labor	18,020 hrs.	2,343.11=	1 hr.	.13 —	15,037 hrs.	2,902.32=	1 hr.	.193	3,477.86
Ties	3,838	1,634.03=	1 tie	.425 —	2,117 ties	1,366.65=	1 tie	.646	2,479.34
Lumber	22,307 ft.	451.99=1,000	ft.	20.26 —	4,849 ft.	141.80=1,000	ft.	29.24	652.25
Wire fence	93 rods	33.92=	1 rod	.363 —	20 rods	9.00=	1 rod	.45	41.85
Salt	217 lbs.	1.15=	1 lb.	.0053—	280 lbs.	4.00=	1 lb.	.0143	3.10
Posts	80	17.42=	1 post	.218 —	10 posts	3.00=	1 post	.30	24.00
Shovels	10	8.75=	1 shovel	.875 —	1 dozen	15.00=	1 sho'l	1.25	12.50
		$5,244.12				$5,491.77			$7,740.90
Non-comparable items		197.07			(Equation factor 1.4344)				282.68
Non-comparable items		.....				1,484.16			.....
Superintendence		150.00				150.00			150.00
		$5,591.19				$7,125.93			$8,173.58
Deducting actual expenditures six months, 1918									7,125.93
Total									$1,047.65

Equipment

	Locomotive								
Superintendence	6 mos.	$150.00=1 mo.	$25.00 —	6 mos.	$210.00=1 mo.	$35.00	$210.00	
Labor	1,013 hrs.	258.13=1 hr.	.2548—	542 hrs.	157.43=1 hr.	.2905	294.27	
Castings	625 lbs.	12.51=1 lb.	.02 —	2,668 lbs.	124.74=1 lb.	.0467	29.18	
Driver Shoes	740 lbs.	23.60=1 lb.	.032 —	3,745 lbs.	153.60=1 lb.	.41	30.34	$563.79
		$444.24						
Non-comparable items		1,153.33			500.27			
Lap-over adjusted 1/6		26.57			Dr. 241.77			

Deductions:						
Copper ferrules Truck bolsters Air Hose Gasket	..... 1/6	7.80 22.50 16.17				
Flues		66.25	$1,067.18	Equation Factor	1.4344	$1,530.76
Cars						
Labor ..... 2,621 hrs.		$496.13=1 hr.	$.189 —3,203 hrs.	$692.17=1 hr.	$.216	566.13
Non-comparable items.....		1,032.43		492.04		
Lap-overs adjusted 1/6 Cr.....		18.49		Dr. 408.21		
		1,013.94		Equation factor	1.4344	1,454.40
		$3,137.49		$2,980.23		$4,115.08
Deducting actual expenditures six months, 1918.....						2,980.23
						1,134.85
Add Way and Structure.....						1,047.65
						2,182.50
Add Depreciation.....						2,514.87
Total						$4,697.37

[fol. 37] We find and report that four thousand six hundred and ninety-seven dollars and thirty-seven cents (4,697.37) is just compensation to the plaintiff on account of the failure of respondent to return its property in as good repair and complete equipment as it was in at the commencement of Federal control; and that the total amount of unadjusted just compensation due the plaintiff from the respondent is fourteen thousand four hundred and twenty-five dollars and ninety-four cents ($14,425.94).

Respectfully submitted, Daniel W. Knowlton, George M. Curtis, Charles V. Burnside, Referees.

September 30, 1922.

I, H. L. Kent, Clerk of the Circuit Court of Smyth County, do hereby certify that the following is a true and correct copy of the Seventh clause of the mortgage executed by the Marion & Rye Valley Railway Company to the Radford Trust Company of Radford, [fol. 38] Virginia, on the 1st day of January, 1902, securing an issue of $175,000.00 of first mortgage bonds:

"Seventh: If any default shall be made in payment of any of the said bonds, coupons, at the time and place when and where the same shall become payable, and such default shall continue for three months thereafter; or if the party of the first part shall fail to keep any of the other covenants herein contained or shall continue in such failure for three months after demand of compliance by the party of the second part, or its successors or successor, then, and in either of such cases, the said Radford Trust Company, as Trustee, on the request in writing of the holders of an aggregate par value of a majority in interest of said bonds then in force and so in default, upon being properly indemnified, may forthwith enter into and take possession of all and singular the said mortgaged property, rights, privileges and franchises, and use, operate, and manage the same for the benefit of all the holders of all the said bonds secured by this conveyance as hereinafter more particularly provided for; and if such default shall continue for the space of six months from the time of the happening thereof, and in any such case, the said trustee, either after or without entering upon and taking such possession as aforesaid, upon the request in writing of the holders of the bonds of an aggregate par value of a majority in interest, shall proceed to sell the said mortgaged premises, property rights, privileges, franchises and appurtenances, or so much thereof as may be necessary, at public auction in the Town of Marion, State of Virginia, after causing notice of time and place of such sale to be published weekly during the period of not less than two months prior thereto, in two newspapers of large circulation, published [fol. 39] in the State of Virginia, one of which at least shall be in the Town of Marion, and the party of the second part, may, in its discretion, adjourn such sale from day to day and time to time; but if such adjournment shall be made for more than ten days, a notice thereof shall be published in said newspaper at least once

before the day to which the sale is adjourned. On making the sale of the mortgaged premises and property, as aforesaid, the party of the second part shall execute and deliver to the purchaser or purchasers, a deed or deeds of transfer or transfers, which shall convey and transfer to him or them respectively a full and valid title to the property sold; and the recitals in said deeds or transfers of any of the above mentioned defaults, refusals to pay, or breach of covenants of any other act, omission of fact necessary to provide and authorize such sale, shall be as conclusive evidence of such default, refusal to pay, breach of covenant or other act or omission of fact as if the same had upon due inquiry upon legal proceedings fully ascertained and judicially declared and determined; and such deeds and transfers shall be a perpetual bar and estoppel to any claims or demands of the party of the first part, its successors, assigns, or stockholders, to the property which shall purport to be transferred or conveyed thereby. In lieu, however, of the aforesaid proceedings by entry into possession, or by the power of sale, the said party of the second part may in its discretion, in case of any default by the said party of the first part, in any of the payments, conditions or covenants, herein provided for and contained, foreclose the equity of redemption of the party of the first part and of all other parties having any legal or equitable rights or claims in, to or against the mortgaged premises and property or any part or parcel thereof, including all rights and franchises herein and hereby conveyed and appurtenant thereto, by pro-
[fol. 40] ceedings at law or in equity, provided for by laws of Virginia, in which the said mortgaged property lies, and in either of the Courts of such state or in the Circuit Court of the United States; it being distinctly understood and agreed that in the event of any sale by the trustees or trustee for the time being, by virtue of any power or powers herein conferred or otherwise acquired, or in the event of any sale under proceedings in foreclosure, the whole principal sums of each and all of the bonds then outstanding and unpaid, and intended to be secured hereby, shall thereupon forthwith become due and payable, notwithstanding the same may *be* by the terms of said bonds be payable at other times."

I further certify that the Radford Trust Company, the original trustee in the mortgage, has ceased to do business and has been dissolved under the laws of the State of Virginia. I further certify that Floyd L. Knight was substituted as trustee in accordance with the provisions of the mortgage on the 17th day of July, 1922, and that the following is a true copy of the order of the Board of Directors substituting Floyd L. Knight as trustee: as filed in the chancery cause of Knight, Trustee for Marion & Rye Valley Railway Company.

"Minutes of the special meeting of the Board of Directors of the Marion & Rye Valley Railway Company held at 318 Mutual Building, Richmond, Va., on July 17, 1922, at 10 o'clock a. m., pursuant to due and written notice given all the members thereof Present: F. Sitterding, W. H. Sitterding, H. G. Buchanan, and Holt S. Lloyd, being a majority of the Board.

[fol. 41] Mr. F. Sitterding presided and Mr. Lloyd recorded the minutes.

Mr. Lloyd presented and read a copy of the notice mailed July 12, 1922, to all the members of the Board calling this special meeting, which notice was ordered to be recorded at the end of these minutes.

Mr. Lloyd presented and read to the meeting a communication from the Virginia Trust Company, dated July 11, 1922, tendering its resignation, effective upon the appointment of its successor, as trustee in the mortgage of this Company dated January 1, 1902, given on all of its franchises and properties to secure an issue of $175,000 coupon bonds. On motion this resignation was accepted and ordered to be recorded with the minutes of this meeting.

Mr. Lloyd presented and read to the meeting a communication dated July 12, 1922, from Mrs. M. E. Knight, the holder of $105,000 of the coupon bonds dated January 1, 1902, requesting and approving the appointment by resolution of this Board of Floyd L. Knight, Esq., of Lynchburg, Va., as trustee in the mortgage dated January 1, 1902, in the place and stead of the Virginia Trust Company, resigned. It was ordered that this communication be made a part of the record of this meeting.

On motion duly made and seconded, the following resolution was unanimously adopted:

Whereas, the Virginia Trust Company, which was on the 29th day of May, 1920, substituted as trustee in the mortgage dated the 1st day of January, 1902, given by this Company on its franchises [fol. 42] and properties to secure the issue of $175,000 of coupon bonds, did on the 11th day of July, 1922, tender its resignaton as said trustee aforesaid, effective upon the appointment of its successor; and

Whereas, the resignation of said Virginia Trust Company, trustees as aforesaid, has this day been accepted by this meeting and Mrs. M. E. Knight, the holder of $105,000 of the bonds issued under and secured by the aforesaid mortgage has requested and approved the appointment of Floyd L. Knight, Esq., of Lynchburg, Va., as trustee in said mortgage in the place and stead of the Virginia Trust Company, resigned; and

Whereas Section 10 of said mortgage provides, among other things, that:

"In case of the dissolution, resignation, or removal of said trustee, the party of the first part, shall, by resolution of its Board of Directors, with the approval in writing of the holders of at least

$100,000.00 of such bonds then in force and outstanding, thereupon choose or appoint a new trustee or trustees to supply such vacancy or place; and so from time to time, the place or places of such trustee or trustees shall be filled in such manner and without any discontinuance of the trust hereby created; and such new trustees shall forthwith on such appointment succeed to and be vested with all the estate, rights, powers, duties, responsibility and authority of a trustee or trustees, granted, confirmed, or imposed by these presents, without further assurance, conveyance, deed or transfer in writing, as fully and perfectly as if it, he, or they had been named in these presents as party or parties of the second part."

Therefore be it resolved, Floyd L. Knight, Esq., of Lynchburg, [fol. 43] Va., be and he is hereby substituted as trustee in the mortgage on the franchises and properties of the Marion & Rye Valley Railway Company dated the 1st day of January, 1902, and that he be and is hereby vested with all the estate, rights, powers, duties, responsibility and authority granted, confirmed or imposed by the aforesaid mortgage on the original trustee named therein.

On motion duly made and seconded, the following resolution was adopted:

Resolved, That the secretary be and he is hereby directed to send Mr. Floyd L. Knight a copy of the minutes of this meeting, together with all the papers made a part thereof, duly attested.

There being no further business, the meeting adjourned.

(Signed) Holt S. Lloyd, Secretary.

And I further certify that Floyd L. Knight, Trustee, filed his bill in the Circuit Court of Smyth County, Virginia, at First October Rules, 1922, default having been made in the payment of the principal of said bonds, asking that the said mortgage be foreclosed and he authorized as Trustee to take charge of all and singular the assets of the said corporation and I further certify that the following is a true and correct copy of a portion of a decree entered by said Circuit Court on the 18th day of January, 1923:

"It further appearing to the Court that the Marion & Rye Valley Railway Company has a claim against the United States of America in the amount of $14,425.94, as allowed by Referees of the Interstate [fol. 44] Commerce Commission, the Compensation Docket of said Commission, but that the Director General of Railroads has declined to pay the same and that in order to obtain payment thereof its allowance by the U. S. Court of Claims will be neqessary, the said Trustee is hereby authorized and directed to collect said funds and to employ counsel under a reasonable contingent fee agreement, subject to any burdens that are properly chargeable to said fund and to the approval of this Court in this cause, to prosecute the said last mentioned claim to collection if possible."

Given under my hand and seal of the Court this 27th day of April, 1923.

H. L. Kent, Clerk of Circuit Court of Smyth County. (Seal.)

[fol. 45] II. General Traverse—Aug. 1, 1923

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. History of Proceedings

On May 6, 1924, this case was argued and submitted by Mr. Ben B. Cain, for the plaintiff, and by Mr. A. A. McLaughlin, for the defendant.

On May 19, 1924, the court filed findings of fact and conclusion of law, with an opinion by Hay, J., and entered judgment against the plaintiff in the sum of $34.97, for printing of the record.

On May 26, 1924, the court filed an order amending the findings of fact.

On July 12, 1924, the plaintiff filed a motion for a new trial.

IV. Argument and Submission of Motion for New Trial

On January 12, 1925, the plaintiff's motion for a new trial was argued and submitted by Mr. Ben B. Cain, for plaintiff, by Mr. Milton C. Elliott, as amicus curiæ, and Mr. A. A. McLaughlin, for defendant.

V. Order of Court—Entered January 26, 1925

It is ordered by the Court this 26th day of January, 1925, that the plaintiff's motion for new trial be and the same is overruled.

It is further ordered that the former findings of fact, conclusion of law, and opinion be and they are vacated, set aside and withdrawn, and new findings of fact are this day filed with a conclusion of law dismissing petition. Opinion by Judge Hay.

[fol. 46] VI. **Findings of Fact, Conclusion of Law, and Opinion of the Court by Hay, J.**—Entered January 26, 1925

This case having been heard by the Court of Claims upon a stipulation of the facts made between the parties signed by Ben B. Cain, plaintiff's attorney, and Robert H. Lovett, Assistant Attorney General, the court adopts the said stipulation and sets it out as follows as and for its

Findings of Fact

I

December 26th, 1917, the President of the United States issued the following proclamation, together with the following statement, to wit:

"By the President of the United States of America

"A Proclamation

"Whereas the Congress of the United States, in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives bearing date of April 6, 1917, resolved:

"That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States.

"And by joint resolution bearing date of December 7, 1917, resolved:

"That a state of war is hereby declared to exist between the United States of America and the Imperial and Royal Austro-Hun- [fol. 47] garian Government; and that the President be, and he is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial and Royal Austro-Hungarian Government; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States.

"And whereas it is provided by section 1 of the act approved August 29, 1916, entitled 'An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes,' as follows:

"The President in time of war is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment, and for such other purposes connected with the emergency as may be needful or desirable.

"And whereas it has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion, as far as may be necessary, of other than war traffic thereon, for the transportation

of troops, war material, and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war;

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, do hereby, through Newton D. Baker, Secretary of War, take possession, and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned on controlled systems of coastwise and inland transportation engaged in general transportation; whether operated by steam or by electric power, including also terminals, terminal companies, and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail-and-water systems of transportation; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material, and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

"It is hereby directed that the possession, control, operation, and utilization of such transportation systems, hereby by me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said director may perform the duties imposed upon him, so long and to [fol. 48] such extent as he shall determine, through the boards of directors, receivers, officers, and employees of said systems of transportation. Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies.

"Until and except as far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such.

"Nothing herein shall be construed as now affecting the possession, operation, and control of street electric passenger railways, including railways commonly called interurbans, whether such railways be or be not owned or controlled by such railroad companies or systems. By subsequent order and proclamation, if and when it shall be found necessary or desirable, possession, control, or opera-

tion may be taken of all or any part of such street railway system, including subways and tunnels; and by subsequent order and proclamation possession, control, and operation in whole or in part may also be relinquished to the owners thereof of any part of the railroad systems or rail and water systems, possession, and control of which are hereby assumed.

"The director shall, as soon as may be after having assumed such possession and control, enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use, and control of their respective properties on the basis of an annual guaranteed compensation above accruing depreciation and the maintenance of their properties equivalent, as nearly as may be, to the average of the net operating income thereof for the three-year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful.

"But nothing herein contained, expressed or implied, or hereafter done or suffered hereunder, shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors, and other persons having interests in said systems of transportation or in the profits thereof to receive just and adequate compensation for the use and control and operation of their property hereby assumed.

"Regular dividends hitherto declared and maturing interest upon bonds, debentures, and other obligations may be paid in due course; and such regular dividends and interest may continue to be paid until and unless the said director shall from time to time otherwise by general or special orders determine; and, subject to the approval of the director, the various carriers may agree upon and arrange for the renewal and extension of maturing obligations.

"Except with the prior written assent of said director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in [fol. 49] the conduct of their business as common carriers; but suits may be brought by and against such carriers and judgments rendered as hitherto until and except so far as said director may, by general or special orders, otherwise determine.

"From and after 12 o'clock on said 28th day of December, 1917, all transportation system included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice. But for the purpose of accounting said possession and control shall date from 12 o'clock midnight on December 31, 1917.

"In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done by the President, through Newton D. Baker, Secretary of War, in the District of Columbia, this 26th day of December, in the year of our Lord one thousand nine hundred and seventeen, and of the independence of the United States the one hundred and forty-second. "Woodrow Wilson.

"By the President: Robert Lansing, Secretary of State. Newton D. Baker, Secretary of War."

Statement of the President

"I have exercised the powers over the transportation systems of the country which were granted me by the act of Congress of last August because it has become imperatively necessary for me to do so. This is a war of resources no less than of men, perhaps even more than of men, and it is necessary for the complete mobilization of our resources that the transportation systems of the country should be organized and employed under a single authority and the simplified method of coordination which have not proved possible under private management and control. The committee of railway executives who have been cooperating with the Government in this all-important matter have done the utmost that it was possible for them to do; have done it with patriotic zeal and with great ability; but there were difficulties that they could neither escape nor neutralize. Complete unity of administration in the present circumstances involves upon occasion and at many points a serious dislocation of earnings, and the committee was, of course, without power or authority to rearrange charges or effect proper compensations and adjustments of earnings. Several roads which were willingly and with admirable public spirit accepting the orders of the committee have already suffered from these circumstances and should not be required to suffer further. In mere fairness to them the full authority of the Government must be substituted. The Government itself will thereby gain an immense increase of efficiency in the conduct of the war and of the innumerable activities upon which its successful conduct depends.

"The public interest must be first served, and, in addition, the financial interests of the Government and the financial interests of the railways must be brought under a common direction. The [fol. 50] financial operations of the railways need not then interfere with the borrowings of the Government, and they themselves can be conducted at a greater advantage. Investors in railway securities may rest assured that their rights and interests will be as scrupulously looked after by the Government as they could be by the directors of the several railway systems. Immediately upon the reassembling of Congress I shall recommend that these definite guarantees be given: First, of course, that the railway properties will be maintained during the period of Federal control in as good repair and as complete equipment as when taken over by the Government; and, second, that the roads shall receive a net operating income equal in each case to the average net income of the three years preceding June 30, 1917; and I am entirely confident that the Congress will be disposed in this case, as in others, to see that justice is done and full security assured to the owners and creditors of the great systems which the Government must now use under its own direction or else suffer serious embarrassment.

"The Secretary of War and I are agreed that, all the circumstances being taken into consideration, the best results can be obtained under the immediate executive direction of the Hon. William G. McAdoo, whose practical experience peculiarly fits him for

the service and whose authority as Secretary of the Treasury will enable him to coordinate as no other man could the many financial interests which will be involved and which might, unless systematically directed, suffer very embarrassing entanglements.

"The Government of the United States is the only great Government now engaged in the war which has not already assumed control of this sort. It was thought to be in the spirit of American institutions to attempt to do everything that was necessary through private management, and if zeal and ability and patriotic motive could have accomplished the necessary unification of administration it would certainly have been accomplished; but no zeal or ability could overcome unsuperable obstacles, and I have deemed it my duty to recognize that fact in all candor, now that it is demonstrated, and to use without reserve the great authority reposed in me. A great national necessity dictated the action, and I was therefore not at liberty to abstain from it.

"Woodrow Wilson."

III

Following said proclamation and statement, William G. McAdoo, named therein as Director General of Railroads, issued various general orders and circulars to the railroads generally, the following of which were received and complied with by the plaintiff, to wit:

"Office of the Director General of Railroads

"Washington, December 28, 1917.

"To the Presidents and Directors of All Railroad Companies:

"Having assumed the duties imposed upon me by, and in pursuance of, the proclamation of the President dated December 26, 1917, you will, until otherwise ordered, continue the operation of your road in conformity with said proclamation. You are requested to make every possible effort to increase efficiency and to move traffic [fol. 51] by the most convenient and expeditious routes.

"I confidently count on your hearty cooperation. It is only through united effort, unselfish service and effective work that this war can be won and America's future be secured.

"W. G. McAdoo, Director General of Railroads."

"Director General of Railroads

"Washington, December 29, 1917.

"Order No. 1

"Pursuant to the order of the President of the United States, through the Secretary of War, the undersigned, as Director General of Railroads, has taken possession and assumed control of certain transportation systems described in the proclamation of the President of which proclamation and order officers, agents, and employees

of said transportation systems are to take immediate and careful notice. In addition to the provisions therein contained, it is,

Until further ordered, directed that—

"1. All officers, agents, and employees of such transportation systems may continue in the performance of their present regular duties, reporting to the same officers as heretofore and on the same terms of employment.

"2. Any officer, agent, or employee desiring to retire from his employment shall give the usual and seasonable notice to the proper officer to the end that there may be no interruption or impairment of the transportation service required for the successful conduct of the war and the needs of general commerce.

"3. All transportation systems covered by said proclamation and order shall be operated as a national system of transportation, the common and national needs being in all instances held paramount to any actual or supposed corporate advantage. All terminals, ports, locomotives, rolling stock, and other transportation facilities are to be fully utilized to carry out this purpose without regard to ownership.

"4. The designation of routes by shippers is to be disregarded when speed and efficiency of transportation service may thus be promoted.

"5. Traffic agreements between carriers must not be permitted to interfere with expeditious movements.

"6. Through routes which have not heretofore been established because of short hauling or other causes, are to be established and used whenever expedition and efficiency of traffic will thereby be promoted; and if difficulty is experienced in such through routing, notice thereof shall by carriers or shippers or both be given at once to the director by wire.

"7. Existing schedules of rates and outstanding orders of the Interstate Commerce Commission are to be observed, but any such schedules of rates or orders as may hereafter be found to conflict with the purposes of said proclamation or with this order shall be brought immediately by wire to the attention of the director.

"W. G. McAdoo, Director General of Railroads."

[fol. 52] "Office of the Director General of Railroads

"Washington, D. C., December 29, 1917.

"General Order No. 2

"To the Chief Executives of the Railroads:

"Pursuant to the authority vested in me by the President of the United States in his proclamation of December 26, 1917, wherein it was stated that for purposes of accounting, possession, and control

of the railroads shall date from 12 o'clock midnight on December 31, 1917, you are notified that, until otherwise directed, no changes in the present methods of accounting as prescribed by the Interstate Commerce Commission will be required. The accounts of your respective companies shall be closed as of December 31, 1917, and opened as of January 1, 1918, in the same manner as they have heretofore been handled at the close of one fiscal period and the beginning of another; and in the same manner that you should have handled your accounts had the Government not taken possession and control.

"William G. McAdoo, Director General of Railroads."

"Director General of Railroads, Interstate Commerce Commission Building

"Washington, January 8, 1918.

"To all Railroad Officers and Employees:

"The Government of the United States having assumed possession and control of the railroads for the period of the present war with Germany, it becomes more than ever obligatory upon every officer and employee of the railroads to apply himself with unreserved energy and unquestioned loyalty to his work.

"The supreme interests of the Nation have compelled the drafting of a great army of our best young men and sending them to the bloody fields of France to fight for the lives and liberties of those who stay at home. The sacrifices we are exacting of these noble American boys call to us who stay at home with an irresitable appeal to support them with our most unselfish labor and effort in the work we must do at home, if our armies are to save America from the serious dangers that confront her. Upon the railroads rest a grave responsibility for the success of the war. The railroads can not be efficiently operated without the wholehearted and loyal support of everyone in the service from the highest to the lowest.

"I earnestly appeal to you to apply yourselves with new devotion and energy to your work, to keep trains moving on schedule time and to meet the demands upon the transportation lines, so that our soldiers and sailors may want for nothing which will enable them to fight the enemy to a standstill and win a glorious victory for united America.

"Every railroad officer and employee is now, in effect, in the service of the United States, and every officer and employee is just as important a factor in winning the war as the men in uniform who are fighting in the trenches.

[fol. 53] "I am giving careful consideration to the problems of railroad employees and every effort will be made to deal with these problems justly and fairly and at the earliest possible moment. There should be a new incentive to every one in railroad service while under Government direction to acquit himself with honor and credit to himself and to the country.

"W. G. McAdoo, Director General of Railroads."

"N. B.—The Director General of Railroads requests that the above statement be posted by all railroads."

[Western Union Telegram]

Washington, D. C., Jan. 18-18.

"L. A. Ambler, Gen. Mgr. Virginia Southern R. R., Marion, Va.:

"In view of the order of the fuel administration for a five day cessation of industrial activity in this territory for the purpose of accumulating and distributing an ample fuel supply I urge and direct that every possible effort be made by the railroads to move coal and cooperate to the minutia with the fuel administration for the accomplishment of the desired end. I hope that the officers and employees of the railroads will do their part so effectively that there may be no further occasion for the interruption of the industrial and normal activity of the Nation.

"W. G. McAdoo, Director General."

"Director General of Railroads, Interstate Commerce Building

Washington, March 25, 1918.

"General Order No. 14

"The committee on transportation, American Railway Association, having at the request of the director general submitted a report in connection with the Federal law. 'To save daylight and to provide standard time for the United States,' which becomes effective at 2:00 a. m., Sunday, March 31, 1918, the following instructions, based on such report, are hereby issued:

"First. At 2:00 a. m., Sunday, March 31st, all clocks and watches in train dispatchers' offices, and in all other offices open at that time, must be advanced one hour to indicate 3:00 a. m.

"Employees in every open office must, as soon as the change has been made, compare time with the train dispatcher. Clocks and watches in all offices at the first opening, at or after the time the change becomes effective, must be advanced to conform to the new standard time, and employees, before assuming duties in such offices, must, after the change is made, compare time with the train dispatcher.

"Second. Each railroad will issue necessary instructions and arrange for such supervision and check of the watches of its employees [fol. 54] as to insure that they have been properly changed to conform to the new standard time.

"Third. Owing to the varying conditions which will prevail on the railroads of the United States, it is not advisable to issue a uniform rule or order to cover the details involved in the movement of trains at the period the change in standard time becomes effective.

Therefore each railroad must adopt such measures as may be necessary to properly safeguard the movement of its trains on the road at the time of the change.

"W. G. McAdoo, Director General of Railroads."

"General Order No. 28

"Washington, D. C., May 25, 1918.

"Whereas it has been found and is hereby certified to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, and,

"Whereas the public interest requires that a general advance in all freight rates, passenger fares, and baggage charges on all traffic carried by all railroad and steamship lines taken under Federal control under an act of Congress approved August 29, 1916, entitled 'An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' shall be made by initiating the necessary rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission under authority of an act of Congress approved March 21, 1918, entitled 'An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes.'

"Now, therefore, under and by virtue of the provisions of the said act of March 21, 1918, it is ordered that all existing freight rates, passenger fares, and baggage charges, including changes heretofore published but not yet effective, on all traffic carried by all said railroad and steamship lines under Federal control, whether the same be carried entirely by railroad, entirely by water, or partly by railroad and partly by water, except traffic carried entirely by water to and from foreign countries, be increased or modified, effective June 23, 1918, as to freight rates and effective June 10, 1918, as to passenger fares and baggage charges, to the extent and in the manner indicated and set forth in the 'Exhibit' hereto attached and made part hereof, by filing schedules with the Interstate Commerce Commission effective on not less than one day's notice.

"Given under my hand this the 25th day of May, 1918.

"W. G. McAdoo, Director General of Railroads."

[fol. 55]

IV

It is agreed that the allegations in Paragraphs I, II, III, V, X, and XIII of plaintiff's petition filed herein shall be taken as true and that a true copy of the report of the board of referees appointed as alleged in paragraph X of said petition is attached as appendix thereto and same is made a part hereof by reference.

V

John P. Buchanan, a witness for petitioner, before board of referees, stated that at the beginning of Federal control he had general supervision of the management of the road and was substantially its managing director. Upon receipt of General Order No. 1 he had some doubt as to whether his road was intended to be taken under Federal control, and he then and there wired the director general and asked if the Marion and Rye Valley Railway was under Federal control and if he should observe the order. He received a reply from the director general directing him to obey the order.

Witness was not able to produce the director general's telegram at the trial, stating that said telegram had been taken by him along with certain letters and telegrams from the director general and left with the Interstate Commerce Commission in the month of June, 1918. The circumstances under which said telegram was thus left in possession of the commission were that there was some uncertainty in June, 1918, as to whether the Marion & Rye Valley Railroad should put into effect the increase in passenger fares and freight rates authorized by General Order No. 28 of the director general. The witness, as general counsel for petitioner, conferred with the Corporation Commission of the State of Virginia, whereupon the State Corporation Commission of Virginia wrote witness that petitioner was under Federal control; thereupon witness took the matter up with the Interstate Commerce Commission and on that occasion brought the said telegram and other correspondence to Washington and left the same with the Interstate Commerce Commission. That as a predicate for offering oral proof witness testified that the files of the Commission had been searched for the message in question but without success. A search of the files of the Director General of Railroads failed to disclose that such telegram had been received or answered by the director general.

VI

In connection with General Order No. 28, testimony was introduced before the board of referees showing that at the date of its issuance there was pending before the State Corporation Commission of Virginia an application for an increase in rates and the said commission refused to take action on the ground that it was without jurisdiction. The matter was then presented to the officers of the Railroad Administration and the Interstate Commerce Commission for instructions and acting under authority of the Interstate Commerce Commission and the director general the increases named in General Order No. 28 were put into effect by plaintiff.

Instructions were issued by H. C. Buchanan, vice president, and B. F. Buchanan, general counsel for plaintiff, to the auditor of [fol. 56] petitioner that increase of twenty-five per cent in all rates be put into effect as of June 25, 1918. At the conclusion of conferences with officer of the Railroad Administration and the Interstate Commerce Commission and as a result of such conferences,

H. G. Buchanan, general counsel for plaintiff, telegraphed the auditor from Washington, D. C., as follows:

"Have seen commission. You have authority to enforce 25% rate increase as of twenty-fifth instant until Federal control relinquished."

VII

General Order No. 27, commonly known as the wage order, issued by the Director General of Railroads May 25, 1918, pursuant to which wages of employees on railroads being operated by the Government under Federal control, were increased, was not made applicable to the railroad of plaintiff, and was not applied thereon. General Order No. 27 named the railroads to which it was applicable and did not name plaintiff.

VIII

On the third or fourth of July, 1918, plaintiff received from John Barton Payne, general counsel for the director general, the following notice, to wit:

"June 24, 1918.

"DEAR SIR: It is not clear whether the Marion & Rye Valley Railway Company has at any time been under Federal control. To remove any possible question this order is issued definitely relinquishing same.

"Very truly yours, (Signed) John Barton Payne.

"T. S. Ambler, Gen. Mgr. Marion & Rye Valley Ry. Co."

IX

In due course the plaintiff presented a claim to the Interstate Commerce Commission under section 204 of the transportation act of 1920 and the bureau of accounts of the commission in connection therewith advised plaintiff as follows:

"The commission has held for the purpose of computing the amount payable under section 204 of the transportation act of 1920 that the period during which the carrier operated its own railroad or system of transportation dates from the time its property was relinquished by the Railroad Administration in the manner provided in the Federal control act. As the property of your company was formally relinquished on June 24, 1918, it is held to have been under Federal control for the period from January 1, 1918, to June 24, 1918." Subsequent to this communication from the bureau of accounts the commission made an order which contained the following:

[fol. 57] "The Marion & Rye Valley Railway Company, a corporation of the State of Virginia, hereinafter termed 'the carrier' is a

steam railroad company which, during the full control period engaged as a common carrier in general transportation, operating a line of railroad between Marion and Sugar Grove, Virginia, a distance of seventeen and seven-tenths miles which connected with the Norfolk & Western Railway, a railroad under Federal control. It is therefore a carrier within the meaning of paragraph (a) of section 204 of the transportation act, 1920. The carrier was under Federal control from January 1, 1918, to June 30, 1918, inclusive, and is entitled to the benefits of section 204 for the period from July 1, 1918, to February 29, 1920, inclusive."

X

The Marion & Rye Valley Railway is standard gauge and interchanged traffic and equipment under the conditions usually pertaining between connecting railroads in the United States; it has always engaged in a considerable volume of competitive traffic. It connects at Marion with the Norfolk & Western Railroad and at Sugar Grove with the Virginia Southern Railroad, which latter road was and is operated by the same officials as operated the Marion & Rye Valley Railway. The Marion & Rye Valley and the Virginia Southern connected at Sugar Grove and formed a continuous line to the terminus of the Virginia Southern. During a portion of the test period the Virginia Southern extended to Fairwood, three miles from Troutdale. At Fairwood there was located a large lumber mill. In the year 1915 or 1916 this lumber mill ceased operating and was abandoned, and subsequently that portion of the track of the Virginia Southern extending from Troutdale to Fairwood was taken up. After said mill at Fairwood was abandoned no traffic of any consequence was received from Fairwood. While the Marion & Rye Valley Railway connected with the Norfolk & Western Railroad a large portion of its traffic came from the Virginia Southern, which traffic could be diverted to the Virginia Carolina Railroad, about twenty-five miles distant across the country. The country is rough but the bulk of the traffic comes from Grafton, Ash, and Allegheny Counties, equally accessible to the Virginia Southern and Virginia Carolina, and plaintiff could not get traffic out of that section except on a competitive basis because the Virginia Carolina rates are higher. Traffic off of the Virginia Southern moved over the plaintiff's railroad. The Virginia Carolina Railroad was under Federal control, being a part of the Norfolk & Western Railroad system.

XI

Plaintiff did not keep separate books during the period of alleged Federal control, but closed its books as of January 1, 1918, and continued to keep the accounts thereafter as directed by General Order No. 2, hereinbefore quoted.

XII

In 1899 the Marion & Rye Valley Railroad Company was sold under foreclosure proceedings to the petitioner, the Marion & Rye [fol. 58] Valley Railway Company which was incorporated February 3, 1900, under the general laws of Virginia. About 1906 the United States Spruce Lumber Company acquired all of the capital stock of the plaintiff. About 1916 said capital stock was purchased by F. Sitterding, C. B. Buchanan, and J. B. Buchanan, who are the present owners. At the time of acquiring the ownership of the capital stock of plaintiff the United States Spruce Lumber Company owned and operated a large lumber mill just outside of Marion, situated on the line of the railroad, and also owned and operated the large lumber mill at Fairwood, heretofore mentioned, at the then terminus of the Virginia Southern Railroad. Said lumber mill at Marion ceased operating in 1916 or 1917, about one year subsequent to the abandonment of said lumber mill at Fairwood.

XIII

It is agreed that from December 28, 1917, to July 1, 1918, the plaintiff's railroad had a net income of $1,897.43, which sum it retained for its own use; that during the aforesaid period it did not turn over any of its earnings to the Director General of Railroads or the United States; that from December 28, 1917, to July 1, 1918, the railroad transported the same character of traffic as it had transported prior thereto; that it did not serve any military camps and did not transport any troops or munitions of war during said period; that during said period there was no change in the manner or method of conducting the operation of said railroad.

During Federal control there was a diminution of car supply. It was not possible to get empty coal hoppers to ship products of the mines theretofore loaded in hoppers. Hoppers went in loaded with coal and were required to be shipped out empty. There was a general demand for such cars, and the conditions were no different than would have happened at other times of car shortage. Before Federal control the plaintiff was allowed to load out hoppers and was compelled to utilize box cars and flats for shippers of mineral and things of that kind.

There were no towns along the line of the Marion & Rye Valley Railroad between Sugar Grove and Marion. There were two villages, at which points there were plants, one a tanning plant, the other a working establishment. The tanning plant was in operation during the period that the plaintiff claims it was under Federal control.

The same officials operated the railroad from December 28, 1917, to July 1, 1918, as had operated it prior thereto; it never received any instructions from the Director General of Railroads applying to it individually. The Company received no orders with reference to the expenditure of money for maintaining its road and received no instructions as to how it should be operated or maintained, other than those heretofore mentioned.

No specific instructions as to the road of the plaintiff were ever received by it from the Director General of Railroads. The plaintiff from December 28, 1918, to June 29, 1919, continued to operate its road exactly as it had always operated it.

[fol. 59] XIV

Plaintiff's average railway operating income for the three fiscal years ended June 30, 1917 (called test period) as certified to by the Interstate Commerce Commission was $23,252.00, one-half of which is $11,626.00. The actual net railway operating income earned by the property from January 1, 1918, to July 1, 1918, was $1,897.43, which amount was $9,728.57 less than its average net income during the said test period. The character of traffic transported by plaintiff and the tonnage thereof for the following periods were as follows:

Tonnage of products of forest:

For six months of test period average was.....	51,917 tons.
For first six months of 1918 was ..... (A decrease of 70.5 per cent.)	15,301 tons.
For calendar year 1916 was	128,889 tons.
For calendar year 1917 was	73,815 tons.
For calendar year 1918 was	33,421 tons.
For calendar year 1919 was	46,914 tons.
For calendar year 1920 was	10,623 tons.

Total tonnage of all revenue freight:

For one-sixth of the test-period was	78,937 tons.
For six months of 1918 ..... (A decrease of 38.58 per cent.)	48,479 tons.
For calendar year 1917 was	170,772 tons.
For calendar year 1918 was	90,622 tons.
For calendar year 1919 was	99,043 tons.
For calendar year 1920 was	48,829 tons.

Tonnage of manufactures:

For calendar year 1917 was	69,937 tons.
For calendar year 1918 was	32,397 tons.
For calendar year 1919 was	29,318 tons.
For calendar year 1920 was	19,892 tons.

Plaintiff's railway operating revenue for the following periods was as follows:

Year ended June 30, 1915	$72,570.54
Year ended June 30, 1916	83,708.08
Year ended June 30, 1917	87,978.59
First six months 1918	29,328.48
Calendar year 1918	62,247.41
Calendar year 1919	67,751.56
Calendar year 1920	63,344.16

XV

The plaintiff charged on its books for depreciation of equipment during the test period, the following amounts:

For year ending June 30, 1915	$7,097.40
For year ending June 30, 1916	7,097.40
For year ending June 30, 1917	894.42

A total for the three years of $15,089.22, or a yearly average of $5,029.74, or a six months' average of $2,514.87.

The board of referees adopted such six months' average as basis for arriving at the item of $2,514.87, described as "Depreciation" in tabulated statement on Sheet 15 of its opinion, and constituting a portion of the amount allowed by the board of referees for failure to return the property of plaintiff in as good condition as on Janu- [fol. 60] ary 1, 1918. The said amount of $15,089.22 depreciation was charged on plaintiff's books in accordance with rules and regulations of the Interstate Commerce Commission in reference to accounting, which rules and regulations are made a part hereof, without copy attached. No evidence of actual depreciation was submitted to the board of referees and said board relied entirely upon the charges made by plaintiff in its books, as aforesaid.

XVI

Defendant concedes that plaintiff's property in controversy was undermaintained during the period January 1 to July 1, 1918, as compared with like six months during the test period and that the amount of such undermaintenance, aside from depreciation, is the amount found by the board of referees, to wit, $2,182.50.

Conclusion of Law

On the foregoing facts the court decides as a conclusion of law that the plaintiff is not entitled to recover, and that its petition be and the same is hereby dismissed. Judgment is rendered against the plaintiff for the cost of printing the record in this cause, the amount thereof to be determined by the clerk, and to be by him collected according to law.

Opinion

Hay, Judge, delivered the opinion of the court:

This case is before us on a motion for a new trial made by the plaintiff. In that motion it is conceded that the findings of fact heretofore found by the court are correct; but the plaintiff contends that the court erred in its conclusion of law. Upon the facts found the court is of the opinion that its conclusion of law is correct, and therefore adheres to its former opinion which was as follows:

This is a suit to recover the sum of $14,425.94, the amount of an award made by the board of referees duly appointed by the Interstate Commerce Commission under section 3 of the Federal Control Act, 40 Stat. 451, and the Transportation Act of 1920, 41 Stat. 456, as the just compensation of the plaintiff for the alleged taking and use of its railroad property by the United States for the period beginning December 28, 1917, and ending June 29, 1918. The Director General of Railroads having refused to accept the report of the board of referees as a basis for settlement the plaintiff filed its petition in this court as provided by law.

The finding of the amount of the award for just compensation by the board of referees is prima facie in this court, but the prima facie effect of the award may be overcome if it appears that the board applied an erroneous measure of compensation, or if it appears from the facts found that there was no taking by the Government of the plaintiff's property for public use.

The first question which is presented for our consideration is, Did the Government take possession of the railroad of the plaintiff and operate and control it for the public use?

[fol. 61] It is not always necessary that in order to constitute a taking the property should be absolutely taken. If there is a serious interruption to the common and necessary use of property such an interruption may be equivalent to the taking of it. But there must be evidence to show that the use of the property was such that its common and necessary use was so seriously interrupted as to cause loss and damage to the owner thereof, and that the owner was deprived of its control and operation in such manner as to prevent him from deriving the benefits which would have accrued had the property not been taken. These principles are particularly applicable in cases where the alleged taking is for the use of the property for a time, and not the taking of the title. There can be no taking of private property for public use unless there is possession and use thereof for public purposes, evidence by some act which deprives the owner of the use, possession, control and operation of his property. A mere declaration of an intention to take can not constitute a taking. The proclamation of the President setting forth that on some future day he will take over the property of certain owners does not of itself constitute a taking of the property. There must be some definite act, some positive proceeding by which the property is actually taken and appropriated before the taking can be consummated. It must be such a taking of the property as that the owner is deprived of, or circumscribed in some way, in the use and enjoyment of his property. If his possession is undisturbed and his property in its value and use is undiminished it can not be said that there is a taking within the meaning of the Constitution.

The plaintiff in this case in order to establish a taking relies upon the proclamation of the President and certain orders which the Director General of Railroads sent to it during the period when the plaintiff alleges that its property was under the control of the Government. The proclamation was issued by the President

on December 26, 1917, and provided "that the possession, control, operation, and utilization of such transportation systems * * * shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads," and "that from and after 12 o'clock on said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice." The possession, control, operation, and utilization to be exercised by the Director General of Railroads in accordance with the proclamation meant that possession must be at least of such a character as to deprive the owner of its control and operation, and that the owner of the property could no longer use it for its own purposes.

The proclamation by itself did not constitute a taking. If no other step had been taken, and no agent of the President had done anything to carry into effect the proclamation of the President, it would certainly not have been regarded as a taking of the property. The contention of the plaintiff that its property was taken by virtue alone of the proclamation of the President can not be sustained.

The plaintiff, however, relies further upon certain general orders sent out by William G. McAdoo as Director General of Railroads as evidencing the intention of the Government to take its property [fol. 62] and as showing that its property was actually taken. Some of these orders were sent to the plaintiff; many of them were not sent to the plaintiff.

Among those sent to the plaintiff was General Order No. 1, dated December 29, 1917, which is addressed to "All concerned," and declares that the Director General of Railroads "has taken possession and assumed control of certain transportation systems described in the proclamation of the President." The receipt of this order by the plaintiff did not constitute a taking of the plaintiff's property. It did not by its terms signify or state that the property of the plaintiff was being taken possession of. It contained nothing which ousted or tended to oust the property of the plaintiff from its control. There were no instructions in the order which caused the plaintiff to change the management and operation of its property. The plaintiff was not deprived of or circumscribed in any way in the use and enjoyment of its property.

The plaintiff also received General Orders Nos. 2, 14, and 28, and two circulars, but none of these interfered in any way with the control and operation of its property by the plaintiff. During the whole period for which the plaintiff claims compensation for the taking and use of its property the plaintiff had absolute control of it. By the testimony of its own general manager it appears that the plaintiff continued to operate its road from December 26, 1917, to June 29, 1918, exactly as it always had operated it. No possession of it was taken, no control over it was exercised, and no use of it was made by the Government at any time. Under this state of facts it is difficult to perceive how a taking of this property for public use can be deduced.

The plainitff seems to rely upon the following letter, which it argues shows that the Government had to have possession in order to relinquish it. The letter is as follows:

DEAR SIR:

It is not clear whether the Marion & Rye Valley Railroad Company has at any time been under Federal control. To remove any possible question, this order is issued definitely relinquishing same.

Very truly yours, John Barton Payne.

Mr. T. S. Ambler, General Manager Marion & Rye Valley Ry. Co.

The letter shows on its face that the general counsel of the Railroad Administration did not believe that the property of the plaintiff was under Federal control, and the letter had for its object the removal of any possible question about the matter.

After reviewing very carefully all the evidence upon which the plaintiff relies to establish a taking of its property for public use the court is of opinion that no taking is shown which comes within the meaning of the Constitution and the law. It follows that the plaintiff can not recover.

It may not be amiss, however, to point out that even if the Government may be said to have had technical control of plaintiff's property, yet that control was not of such a character as would entitle the plaintiff to compensation.

[fol. 63] The plaintiff insists that both the President and the Congress provided for the compensation to which the railroads under Federal control would be entitled, the President in his Proclamation and the Congress by the act of February 28, 1920, 41 Stat. 456, and the act of March 21, 1918, 40 Stat. 451. Without going into the method of compensation set out in the statutes it is sufficient to say that the question of compensation is a judicial question, and just compensation must be determined by the evidence produced before the court. The court is not bound in its findings as to what is just compensation to adopt the method of ascertaining it which may be suggested by the statute. The just compensation to be awarded is to be measured by the loss caused to the property by the taking. The plaintiff in this case is entitled to receive the value of what it has been deprived, and no more. "To award it less would be unjust to it, to award it more would be unjust to the public." Bauman v. Ross, 167 U. S. 548, 574. The question is what has the plaintiff lost? If it has lost nothing it would be gross injustice to require the United States to pay something for nothing. What has the plaintiff lost by the supposed taking? There is no proof that it has lost anything thereby. Its propery has never been out of its own control. It operated it without let or hindrance by the Government during the entire period for which it is claiming that the Government had possession of it. If any loss was incurred during that time it was the result of the plaintiff's own operation and control of its own property.

All the provisions of the statutes which look to compensation of owners of railroad properties could only apply to properties which

were taken possession of by the Government and actually operated and controlled by it. Surely Congress never intended that the United States should pay for the losses or depreciation of properties which the Government did not operate, did not control, did not use, and did not take possession of. For instance, provision is made in the statute for "adequate provision for maintenance of the property." Surely this can only mean adequate provision for maintenance of property in the control of and use by the United States. If the plaintiff did not adequately maintain its property while it was in its own possession and being used by it to the exclusion of the United States and everybody else, is it possible that the United States must pay the plaintiff for the maintenance of its property?

Other reasons are advanced by the plaintiff, and supported by the findings of the board of referees, as to why compensation should be awarded the plaintiff in this case. It is not deemed necessary to recite these reasons which are not sufficient to combat the plain and uncontradicted evidence that the alleged taking of the plaintiff's property did not disturb it in the use and control of its property, nor did it restrict the right of the plaintiff to dispose of it, nor did it cause the plaintiff any pecuniary loss. So if the technical control of the plaintiff's property by the United States caused it to lose nothing, no award of compensation can in justice be made. We think that the property of the plaintiff was not taken by the Government. If there was technical control of the property by the Government it was of such a character that it did not cause any loss to the plaintiff, and does not justify the award of any compensation.

[fol. 64] The plaintiff, however, contends now, for the first time, that if it is not entitled to recover under the act of March 21, 1918, 40 Stat. 454, it is so entitled under section 204 of the act of February 28, 1920, 41 Stat. 460.

Section 204 (c) provides as follows:

"As soon as practicable after March 1, 1920, the commission shall ascertain for every carrier, for every month of the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if any (hereinafter called 'Federal control return'), and the average of its deficit in railway operating income, if, any, and of its railway operating income, if any, for the three corresponding months of the test period taken together (hereinafter called 'test period return'): Provided, That 'test period return' in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation."

Section 204 (d) provides as follows:

"For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the commission shall then ascertain (1) the difference between its Federal control return, if deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if any income, and its Federal control return, if a smaller income, or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier."

It will be observed that what the statute provides for is a deficit to be paid to railroads not under Federal operation, which deficit is to be ascertained in the manner provided for in that act.

In this case there is no proof that the plaintiff had a deficit. The case of the plaintiff is based upon the Federal control act, and the compensation which it is suing for is the compensation which that act provides for. It has no relation to the guaranty which is alleged to have been made by Congress in the transportation act of 1920, and no proof was offered by the plaintiff and no steps have been taken by it to bring itself under the provisions of the latter act. That being so this court can not undertake to pass upon the question whether the plaintiff is or is not entitled to recover under the provisions of the transportation act of 1920.

The motion of the plaintiff for a new trial must be denied, and its petition must be dismissed. It is so ordered.

Graham, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

[fol. 65] VII. JUDGMENT

At a Court of Claims held in the City of Washington on the 26th day of January, A. D., 1925, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order and adjudge that the plaintiff, as aforesaid, is not entitled to recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Thirty-four dollars and ninety-seven cents ($34.97), for printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VIII. Petition for Appeal—Filed February 19, 1925

From the pudgment rendered in the above-entitled cause on the 26th day of January, 1925, in favor of the defendant, the plaintiff, by its attorney, on the 18th day of February, makes application for and gives notice of an appeal to Supreme Court of the United States.

Ben B. Cain, Attorney of Record.

IX. Order Allowing Appeal

It is ordered by the Court this 2d day of March, 1925, that the plaintiff's application for appeal be and same is allowed.

[fol. 66] In Court of Claims of the United States

[Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Hay, J.; of the judgment of the court; of the plaintiff's application for an appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 9th day of March, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal Court of Claims.)

Endorsed on cover: File No. 30,956. Court of Claims. Term No. 315. Marion & Rye Valley Railway Company, appellant, vs. The United States. Filed March 16th, 1925. File No. 30,956.